In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-141

D. H. OVERMYER,
Petitioner,

vs.

MAX W. FORSYTHE, HELEN H. FORSYTHE,
E. BUSH HAYDEN and JEAN MULLIKEN,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Petitioner misstates the nature of the legal issue, or issues, sought to be reviewed. The issue is whether, in a diversity action on a guaranty of performance of a lease, a court in California may reasonably exercise personal jurisdiction over a nonresident defendant where the lease and guaranty were negotiated in California; the guaranty was made in California by

delivery in California to a California resident; the lease and the guaranty were subject to the jurisdiction of courts and the laws of California; the leasehold obligations were, in part, to be performed in California; 100% of the stock of the lessee was owned by a corporation which, in turn, was wholly owned by petitioner; petitioner's guaranty was part of a series of substantially identical transactions with California; the defalcations of petitioner and his corporations caused damage to California residents; and petitioner had many other substantial business contacts with California.

Petitioner's second purported question is moot because the decision of the Ninth Circuit is totally consistent with the scope of jurisdiction permitted by California courts.

STATEMENT OF THE CASE

Petitioner and many corporations bearing his name (Appendix D)[1] have long been engaged in the nationwide enterprise involving the sale and leaseback of warehouses. This enterprise was described in the opinion of The Honorable Roy Babitt, Bankruptcy Judge, dated July 23, 1974, aff'd *In re D. H. Overmyer Co., Inc.*, 510 F.2d 329 (2d Cir. 1975) (Appendix A):

[1]References to Appendix ..... are to the Appendix to this brief. References to A. ..... are to the Appendix to petitioner's brief which omits many matters which were before the District Court and the Ninth Circuit, some of which are in the Appendix hereto.

The debtor is engaged in the business of long term leasing of warehouse space from landlords under lease-back arrangements and short term subleasing of such space to subtenants at rentals in excess of that payable by the debtor to its landlord under the lease-back. This business began when the debtor purchased parcels of land and arranged for the financing necessary for it in order to construct a warehouse on the land. In the finished structure, the debtor would lease space to others or operate a public warehousing enterprise for itself. When the newly constructed warehouses had thus become viable, the land and buildings were sold to an investor subject, of course, to the outstanding encumbrances. Under the terms of the sale, the debtor would take back a lease from the purchaser in a typical lease-back situation, and the debtor would continue to operate the warehouses, collecting from the subtenants the rents called for by the leases between the debtor and the subtenants while the debtor would pay to the landlord-purchaser the amounts reserved by the sale and lease-back instruments. In the lease-backs the typical lease was a net-net lease whereby the landlord-purchaser was to receive fixed rent from the debtor during the life of the lease, the term of which was usually in the vicinity of 30 years including two option periods, but with a reduced rent to be paid by the debtor during those option periods. Under the net-net leases, the debtor, as tenant was obliged to maintain the property and usually to pay all real estate and other taxes as well as mortgage payments. It is noted herein that while the lease between the debtor and the landlord-purchaser covered, with the options, a rather extensive period of time, the

> debtor's subleases with subtenants occupying the warehouse facilities were for short terms, and the total of the rents were in excess of the amount due for landlord-purchaser under the terms of the sale and lease-back to the debtor. (Footnotes omitted)

By this program of construction, sale, and lease-back, petitioner built a complex and widespread warehousing enterprise which was once described to this Court as "having built 'in three years . . . 180 warehouses in thirty states.'" *D. H. Overmyer v. Frick Company,* 405 U.S. 174, 179 (1972). There, the corporate parent was described succinctly:

> Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel in the Ohio post-judgment proceedings stated, it has been party to "tens of thousands of contracts with many contractors."

Id., at 186.

Petitioner was the chairman of the board and sole shareholder of D. H. Overmyer Co., Inc., an Ohio corporation. That corporation, in turn, was the sole shareholder of numerous subsidiaries, each bearing the name "D. H. Overmyer Co., Inc." (Appendix D) Petitioner was employed by many foreign and domestic corporations.

Petitioner periodically visited California in connection with those business operations. From 1967 to 1973, he visited the State of California an average of twice per year in his capacity as chairman of the board and chief executive officer of D. H. Overmyer Co., Inc. (California). (Appendix E)

While in California, petitioner met several times with Herbert W. Richards, a real estate salesman, in connection with the business of various Overmyer corporations. Mr. Richards and his employer, Fox & Carskadon, Inc., acted as brokers in the sale and leaseback to California residents of at least thirteen Overmyer warehouses. (A. 47) Petitioner personally guaranteed the obligations of Overmyer subsidiaries to not less than ten California residents. (Appendix F)

In October, 1968, D. H. Overmyer Co., Inc. (Ohio) offered for sale and leaseback a warehouse located in Portland, Oregon. Dr. Forsythe learned of this warehouse from Mr. Richards. Negotiations took place in the offices of Dr. Forsythe's personal attorney, located in Menlo Park, California. Dr. Forsythe, Mr. Richards, Dr. Forsythe's attorney, and an attorney named James R. B. Fitzsimmons conducted the negotiations. Mr. Fitzsimmons purported to represent not only the petitioner but also D. H. Overmyer Co., Inc. (Ohio), and its subsidiaries. (A, 44-49. Appendix H)[2] At a number of points during the negotiations, Mr. Fitzsimmons consulted by telephone with petitioner regarding negotiations. *(Ibid.)*

Those negotiations resulted in the sale of a warehouse from D. H. Overmyer Co., Inc. (Ohio) to Dr. Forsythe and the leaseback of that warehouse to the Oregon subsidiary. (A. 21-22) Dr. Forsythe refused to enter into the proposed sale and lease-back unless

[2]Petitioner's comments regarding the status of attorney Fitzsimmons are cunning. Neither Mr. Fitzsimmons nor petitioner ever actually denied to the District Court that Mr. Fitzsimmons represented petitioner.

petitioner personally guaranteed the performance of all of the obligations of the Oregon subsidiary. (A. 25, 26. Appendix H) Petitioner unconditionally agreed to guarantee the performance of those obligations for the first five years of the proposed lease. (A. 35) Petitioner confirmed this commitment by sending a telegram addressed to Dr. Forsythe, c/o Mr. Richards, in Menlo Park, California. (A. 45, para. 6; 48, para. 5) On October 21, 1968, petitioner executed his unconditional guaranty, and the guaranty was delivered to Dr. Forsythe in Menlo Park, California, by mail. (A. 26)

Upon receipt of the aforementioned telegram in California, Dr. Forsythe entered into the agreements of purchase and lease. The lease was for a term of twenty years, commencing on October 18, 1968, at a rent of $7,295.83 per month, payable to the lessor in California. (A. 27) The lease explicitly stated that it was the specific understanding of the parties that it was entered into in the State of California and that it would in every respect be subject to the jurisdiction of the courts of the State of California and be interpreted in accordance with the laws of the State of California. (Appendix C)

The Oregon subsidiary breached the lease. (A. 16) On October 25, 1973, petitioner was sued on his guaranty in the United States District Court for the Northern District of California. Subject matter jurisdiction was invoked pursuant to the doctrine of diversity of citizenship. (A. 37-39) Petitioner's motion to dismiss for lack of jurisdiction was denied by the District Court. (A. 11-12)

The only discovery before trial in the District Court was by interrogatory. (Appendix B) Petitioner took no discovery, and neither side took depositions. The matter was tried, on a stipulation of agreed statement of facts filed May 19, 1975, before The Honorable William H. Orrick, Jr., United States District Judge. (A. 20-24)

Judgment for respondents was entered on July 21, 1975, in the principal amount of $90,618.17, plus interest at the rate of 7% per annum, with attorneys fees in the amount of $11,796.38. (A. 20) The Ninth Circuit affirmed. (A. 1-9)

ARGUMENT

In *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), involving the amenability to process in a Washington court of an out-of-state corporation which was not doing business within the state, this Court set forth the modern approach to questions of personal jurisdiction:

> . . . But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id., at 316. This test is not a mechanical one, but rather goes to the basic fairness of the court's assertion of power over the defendant. *Id.*, at 319.

I

THE CONTRACT AND GUARANTY HERE HAVE MORE THAN A SUBSTANTIAL CONNECTION WITH CALIFORNIA

The decisions of the District Court and the Ninth Circuit are consistent with such decisions of this Court as *Hanson v. Denckla,* 357 U.S. 235 (1958), *Perkins v. Benguet Consolidated Mining Company,* 342 U.S. 437 (1952); and *Travelers Health Association v. Virginia,* 339 U.S. 643 (1950). As stated in *McGee v. International Life Insurance Company,* 355 U.S. 220, 223 (1957), "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the forum] State." *Id.*, at 223. There, the nonresident defendant had only one contact with the State of California, namely the contract of insurance upon which it was sued. No agent or representative of the defendant was ever in the State of California. Nevertheless, the minimum contacts criterion was satisfied. A "substantial connection" with California was established, since "[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of the State when he died." *Ibid.*

The contract and guaranty involved here not merely satisfy, but clearly exceed, the substantial

connection with California which is required by the foregoing cases.

A. The contract and guaranty were made in California.

In *McGee, supra,* the insurance contract was merely delivered to a California resident in California. The contacts here, however, were significantly stronger. The guaranty, signed by petitioner in New York, was delivered by mail to Dr. Forsythe in California. All of the negotiations which preceded the purchase and leaseback occurred in Menlo Park, California. Attorney Fitzsimmons actively participated in those negotiations and purported to represent both appellant and his corporations. Dr. Forsythe refused to execute the lease in favor of petitioner's corporations unless petitioner personally guaranteed the performance of the leasehold obligations. During the negotiations, Mr. Fitzsimmons had several telephone conversations with petitioner, one of the results being petitioner's guaranty. (*E.g.,* A. 43-49) Both the confirming telegrams and the formal guaranty were delivered to Dr. Forsythe in Menlo Park, California. (A. 2, 14-15, 20-22)

A guaranty becomes a binding contract only at the time and place of its delivery. *See, e.g., Skaggs-Stone v. Labatt,* 182 Cal.App.2d 142, 5 Cal.Rptr. 88 (1960). Therefore, petitioner's guaranty only became a contract by delivery in the State of California.

Thus, every significant aspect of the negotiations and delivery of both the underlying contract and petitioner's guaranty took place in the Northern Dis-

trict of California. The history of the formation of these contracts bears a much stronger connection with California than did the contract in *McGee*.

B. The underlying lease was specifically subjected to the jurisdiction of the California courts and the laws of that State.

The underlying lease made clear the parties' intention both that the agreement be interpreted according to California law and that it be subject to the jurisdiction of the California courts "in every respect." (Appendix C) Petitioner did not merely guarantee the payment of rent. He unconditionally guaranteed:

> . . . to Landlord the full and prompt payment by Tenant of all the sums to be paid, expended and disbursed by Tenant and the full and prompt performance of any of the other covenants and conditions of The Lease at the times and in the manner and mode as provided by The Lease.

(A. 35)

Since the tenant's obligations were to be determined under California law, and petitioner unconditionally guaranteed the performance of all of the covenants and conditions in the manner and mode provided by the lease, petitioner's own obligations were necessarily subject to California law. He clearly availed himself of the benefits and protections of California law because both the breach of and the limitations upon his duties were to be determined by California law, and the jurisdictional clause selected California as the appropriate forum.

C. The obligation was to be performed in California.

The underlying lease obligation required that the tenant pay rent to the landlord in California. (Appendix G) Petitioner's unconditional guaranty o fthis obligation obligated him to perform in California. His defaults caused damage in California.

II

EVEN IF THERE WERE NO CONTACTS BY PETITIONER WITH CALIFORNIA OTHER THAN THE GUARANTEE SUED UPON HERE, CALIFORNIA WOULD HAVE IN PERSONAM JURISDICTION

Numerous cases have upheld the assertion of long-arm jurisdiction over out-of-state defendants where a single, noninsurance contract was involved and in which the contacts of the defendant with the forum were substantially less than petitioner's contacts with California. *E.g., Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977); *Ameron v. Anvil Industries, Inc.*, 524 F.2d 1144 (9th Cir. 1975); *Gardner Engineering Corp. v. Page Engineering Corp.*, 484 F.2d 27 (8th Cir. 1973); *Jones Enterprises, Inc. v. Atlas Service Corporation*, 442 F.2d 1136 (9th Cir. 1971); *Thompson v. Ecological Science Corporation*, 421 F.2d 467 (8th Cir. 1970); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th Cir. 1969); *Washington Scientific Indus., Inc. v. Pollan Indus., Inc.*, 273 F.Supp. 344 (D. Minn. 1967); *Seilon Incorporated v. Brema S.p.A.*, 271 F. Supp. 516 (N.D. Ohio 1967); and *Waukesha Building*

Corporation v. Jameson, 246 F.Supp. 183 (W.D. Ark. 1965).

The decision of the Ninth Circuit is consistent with decisions of the California courts that *in personam* jurisdiction may attend to even an isolated, noninsurance transaction connected with the state. See, *e.g.*, *Michigan Nat. Bank v. Superior Court*, 23 Cal.App.3d 1, 99 Cal.Rptr. 823 (1972), where the court held that there was personal jurisdiction over an out-of-state bank which had refinanced the purchase of an aircraft located in California, because:

> . . . the contract was delivered in California, the [bank] undertook the dealer-seller's obligations under the chattel mortgage, the payments such as were made were to be remitted from California, and upon performance, or excuse from performing, the real party in interest was entitled to receive clear title to the airplane in this state.

Id., 23 Cal.App.3d at 6. See, also, *Ault v. Dinner for Two, Inc.*, 27 Cal.App.3d 145, 103 Cal.Rptr. 572 (1972).

While the substantial connection to California of the contract and petitioner's guaranty is sufficient for personal jurisdiction, there are numerous other factors which make the decision of the Ninth Circuit incontrovertible.

A. Petitioner's default caused damage to California residents.

Petitioner and his corporations solicited investments from numerous California residents, including respondents. They entered into contractual relationships with respondents. (A. 7 n. 6, 8 n. 9) The foreseeable consequences of the breach of those contracts included damage to California residents. California therefore has personal jurisdiction over appellant. *McGee v. International Life Ins. Co., supra.* Restatement (Second) Conflict of Laws, § 37 (1971).

B. Petitioner had a strong pecuniary interest in executing the guaranty.

Petitioner owned 100% of the outstanding stock of the parent corporation of the principal obligor under the lease, and he was the progenitor of a multitude of other corporations which were part of an international empire. Petitioner had a beneficial interest in the profits which D. H. Overmyer Co., Inc. (Ohio) and (Oregon) would reap as a result of the sale and leaseback. But for petitioner's guaranty, the transaction would not have occurred. Clearly, petitioner executed the guaranty for his own pecuniary gain. As a direct result, corporations wholly owned by him obtained substantial money. (A. 47-48) It is only reasonable that, after both the default of corporations and petitioner's own default, he should respond in the jurisdiction in which the agreements were made, in which persons to whom the obligations are owed reside, and in which the agreements were to be performed. As was stated in Restatement (Second) Conflict of Laws, Section 36, Comment e., p. 150 (1971):

> It is likewise reasonable that a state should exercise judicial jurisdiction over a nonresident individual as to causes of action arising from an act

done, or caused to be done, by him in the state for *pecuniary profit and having substantial consequences there* even though the act is an isolated act not constituting the doing of business in the state. (Emphasis added)

III

PETITIONER'S CONTACTS WITH CALIFORNIA ARE SUFFICIENTLY NUMEROUS THAT THE EXERCISE OF PERSONAL JURISDICTION OVER HIM THERE IS REASONABLE.

Petitioner owns an international corporate empire. He and the corporations bearing his name are not small businesses which happen to have some business contacts outside of their home state. Rather, they are part of a complex and widespread warehousing enterprise which intruded into California, claimed the benefits and protections of California law, and damaged Californians. It is precisely this sort of corporate empire which in fairness and justice should be subject to the jurisdiction of courts in states in which it has business contacts. See *McGee v. International Life Insurance, supra,* 355 U.S. at 222-223.

Even if this litigation had not arisen out of business transacted here, petitioner's contacts with California have been sufficiently numerous and of such duration that he should be subject to personal jurisdiction in that State. Restatement (Second) Conflict of Laws, Section 35, Comment 1. (1971). As the California Supreme Court stated in *Buckeye Boiler*

Co. v. Superior Court, 71 Cal.2d 893, 900, 80 Cal. Rptr. 113 (1969):

> . . . [A] nonresident defendant which derives economic benefit from activity in the forum state and thus does more than a purely local business ordinarily has very little basis for complaining of inconvenience when required to defend itself in that state.

As a result of their nationwide business activities, both petitioner and the Overmyer empire have predictably been parties to litigation throughout the United States. Whatever "burden" or "inconvenience" the petitioner may suffer as a result of this litigation, it is the necessary result of his nationwide conduct. Since petitioner's obligations must be decided under California law, disposition of this matter by courts in California served "the orderly administration of the laws." *Buckeye Boiler Co. v. Superior Court, supra,* 71 Cal.2d at 899.

Petitioner suffered no inconvenience whatever in defending himself, save for the necessity of employing local counsel to defend the action. He was not required to travel to California for depositions since respondents did not depose him, relying instead on answers to interrogatories. Petitioner was not required to travel to California for trial, since the matter was tried on a stipulation of an agreed statement of facts. He was no more inconvenienced by hiring a lawyer to defend himself than if he had been sued in New York, and any such inconvenience was merely equal to that suffered by respondents. Trial in California was eminently fair.

The statements of the court in *Gardner Engineering Corp. v. Page Engineering Company, supra,* 484 F.2d at 33, are particularly apropos:

> Since venue is a procedural rule of convenience, the convenience of the aggrieved party should be first accommodated.
>
> ***
>
> This enlargement of the venue rules must necessarily recognize that whenever a large business entity thrusts itself into a business transaction far from its corporate home that it may well subject itself to the defense of suits in that new jurisdiction.

IV

THE CALIFORNIA CASES CITED BY PETITIONER ARE INAPPOSITE AND PRESENT NO QUESTION APPROPRIATE FOR REVIEW ON WRIT OF CERTIORARI

Petitioner cites six California State decisions in support of his argument that the courts of that State would reject jurisdiction over him. To the contrary, the cases upon which he relies are all distinguishable, and the legal principles expressed in them support the exercise of jurisdiction over petitioner in that State under the circumstances here.

A. Each case was decided on its unique facts.

Petitioner's citation of *Buckeye Boiler Co. v. Superior Court, supra,* is surprising, for the Court there *upheld* personal jurisdiction over an out-of-state corporation which had manufactured a pressure tank which eventually exploded in California, injuring the plaintiff. The Court so held, despite the fact the defendant had no agent, office, sales representative, exclusive agency or sales outlet, warehouse, stock of merchandise, property, or bank account in California. It did not sell on consignment to, or have a commission agreement with, any person or entity in the state. Buckeye's only tie to California involved the sale of pressure tanks to another out-of-state corporation which in turn used the tanks in assembling other products in California. Petitioner here, unlike the defendant in *Buckeye,* has done more than merely transact business outside California which affected California residents; he has contracted directly with numerous California residents, obligating himself to perform within the State.

Belmont Industries, Inc. v. Superior Court, 31 Cal.App.3d 281, 107 Cal.Rptr. 237 (1973), is distinguishable on its facts. The corporate defendant there was engaged in the fabrication and erection of structural steel framework for construction projects on the East Coast of the United States. It was not authorized to do business in California, never had an office or an agent in that State, never sold or purchased any goods there, and, prior to the transactions which gave rise to the litigation, never engaged in any activity whatever in California. It contacted a California corporation, requesting that the latter submit a bid to do drafting work for a construction project in Maryland. The California corporation sent a representative to Pennsylvania to confer about the job, and the Pennsylvania corporation subsequently

mailed a purchase order confirming the award of the contract. The California Court rejected jurisdiction, emphasizing that the contract was consummated outside of California and that it did not call for any performance in California by the defendant. *Id.*, 31 Cal.App.3d at 285, 288. The case before this Court is entirely different. For example, the negotiations leading up to the agreements on both the lease and the guaranty were held in California; the contract was consummated in California; petitioner was required to perform in California; and petitioner has numerous and extensive business dealings in California in addition to the contract which gave rise to the current litigation.

Tiffany Records, Inc. v. M. B. Krupp Distributors, Inc., 276 Cal.App.2d 610, 81 Cal.Rptr. 320 (1969), concerned the amenability to personal jurisdiction of certain out-of-state corporations which had purchased phonograph records from the plaintiff. The records were shipped from California to the defendants and distributed by them in their local areas. At no time did any of the defendants come to California in connection with these purchases. While a few of the defendants made isolated sales of records in California, none of those sales involved records purchased from the plaintiff. Conversely, the plaintiff had sent its employees outside the State to solicit business, and the court emphasized the hardship on the defendants of having to produce business records and witnesses in California. *Id.*, 276 Cal.App.2d at 619. The instant case is entirely different. Petitioner and his

companies solicited business in California; petitioner himself does business here; the obligations which he guaranteed were made and to be performed in California; those obligations expressly claimed jurisdiction in California courts and invoked California law; trial of the matter in California in fact involved no inconvenience to appellant.

Interdyne Co. v. SYS Computer Corp., 31 Cal.App. 3d 508, 107 Cal.Rptr. 499 (1973), involved the sale of computer equipment by a California corporation to one located in New Jersey. Contacts between the parties began when a sales representative of the plaintiff California corporation solicited business from the defendant in New Jersey, and a contract was consummated as a result of negotiations between the parties by letter and telephone. The equipment was shipped by the plaintiff to the defendant, and the plaintiff sued because it had not been paid. The court there held that minimum contacts with California were missing because, apart from the contracts which were the basis of litigation, the defendant had no contacts with California. The case is distinguishable. The negotiations which led up to the contract here took place in California; petitioner has been present in California on numerous occasions for the transaction of business; petitioner has participated in many identical transactions with California residents.

Cornell University Medical College v. Superior Court, 38 Cal.App.3d 311, 113 Cal.Rptr. 291 (1974), involved the amenability to personal jurisdiction of a

non-profit educational institution which contracted by mail to purchase certain scientific equipment from a California corporation. The equipment was damaged in shipment, and the California corporation's insurer refused to pay for the damage. The corporation sued the insurer, and the insurer cross-complained against the college. The college's only contacts with California, aside from the purchase of the equipment, involved sending brochures descriptive of its medical school to California universities, interviewing prospective medical students in California, and holding a banquet in San Francisco. The college's contacts with California were entirely by mail. It had purchased the equipment for educational and scientific purposes, with no intent to encourage or enhance its economic position in California. *Id.*, 38 Cal.App.3d at 316-318. Petitioner's contacts with California dwarf those of the college in that case. Furthermore, Overmyer, unlike Cornell, had a strong pecuniary interest in the transaction which gave rise to litigation.

B. Sibley is distinguishable.

Petitioner's heavy reliance upon *Sibley v. Superior Court,* 16 Cal.3d 442, 128 Cal.Rptr. 34, 546 P.2d 322 (1976), is misplaced. *Sibley* is distinguishable on its facts, so that its legal conclusions are not applicable to this litigation. Plaintiff was a limited partnership having its principal place of business in California. It formed a limited partnership in California for the purpose of operatng two mobile home parks in Georgia. Under the latter partnership agreement, the general partner agreed to make certain monthly payments to plaintiff. Sibley was a Florida resident and was one of three guarantors of the performance by the general partner of its partnership agreement.

Sibley's guaranty was his only connection with the transaction. He was not a party to the partnership agreement and took no part in its negotiation. He did not own any real or personal property in California and did not have any business interests or relations with California except as trustee of a testamentary trust owning property in the State. He had not physically been present in California for over three years, and his presence at that time was in connection with a matter unrelated to the transaction in litigation.

California rejected jurisdiction over Sibley because of the limited nature of his contacts with that State. Unlike petitioner, he had no substantial contacts with California. Unlike petitioner, Sibley had not purposely availed himself of the privilege of conducting business in California or of the benefits and protection of California laws. Unlike petitioner, there was no indication in the record that Sibley had anticipated that he would derive any economic benefit as a result of his guarantee. *Id.,* 16 Cal.3d at 447-48.

The only question presented in *Sibley* was whether jurisdiction could constitutionally be asserted over a nonresident individual "solely by reason of his execution and alleged breach of a guarantee agreement regarding payment of monies owing to a California corporation." *Id.,* 16 Cal.3d at 444. Here, in contrast,

jurisdiction is asserted over appellant because of numerous factors in addition to the mere execution and breach of a guaranty regarding payment of monies in California. The exercise of jurisdiction over appellant is entirely consistent with traditional notions of fair play and substantial justice.

Furthermore, the Court in *Sibley* specifically noted that many of these factors were absent in the case before it, implying that had they been present, the assertion of jurisdiction would have been reasonable.

i. Petitioner here unconditionally guaranteed a lease which, by its terms, was specifically subject to the jurisdiction of California courts and interpreted under California law.

The record in *Sibley* did not indicate that Sibley had purposely availed himself of the privilege of conducting business in California or of the benefits and protection of California laws. In contrast, petitioner here both accepted the binding effect of California law in interpreting his obligations and specifically accepted the jurisdiction of California courts. In guaranteeing performance of all covenants and conditions at the times and in the manner and mode provided in the lease, appellant explicitly accepted the terms of section 26.04 of the lease, which provided for the benefits and protection of both California law and California courts. No comparable provisions were presented in the partnership agreement or the guaranty in *Sibley*.

ii. Petitioner here had a strong pecuniary interest in executing the guaranty.

The record in *Sibley* did not indicate that Sibley anticipated that he would derive any benefit as a result of his guaranty. It was this absence of any "indication that petitioner intended to conduct business or in any other way directly or indirectly gain from dealings in this state," *id.*, 16 Cal.3d at 447-48, that, in the view of the California Supreme Court, distinguished *Sibley* from the numerous recent California decisions, cited at 16 Cal.3d at 447, which have upheld jurisdiction over nonresident defendants.

In sharp contrast to *Sibley*, the uncontradicted evidence and the stipulation of agreed facts presented to the District Court establish that petitioner had a strong pecuniary interest in executing guaranty. His companies received cash for the sale of the warehouse in the amount of $340,000 and retained possession of the warehouse under the lease which petitioner guaranteed. Through a wholly owned corporation, petitioner controlled all of the stock of the lessee. He was both chairman of the board and chief executive officer of the lessee and chairman of the board of the parent corporation. He had a beneficial interest in the profits which the parent and the lessee were to reap in the transactions with respondents. Unlike Sibley, petitioner clearly executed the guaranty so he would derive a substantial economic benefit. Moreover, his execution of the guaranty was part of a continuing course of conduct which affected many California residents in addition to respondents.

Petitioner's contention that his pecuniary interest in executing the guaranty was negated by the transfer of his ownership of D. H. Overmyer Co., Inc. (Ohio) in June, 1969, is absurd. The transfer occurred *after* the sale and leaseback and the execution of his personal guaranty. If *Sibley* stands for the proposition that it would be unreasonable to exercise personal jurisdiction over a nonresident guarantor who does not *anticipate* or *intend* to obtain any economic benefit as a result of his guaranty, that proposition is of no avail to petitioner. Petitioner did anticipate and intended to reap economic gain as a result of the transaction. He owned all of the beneficial interest in the corporation whose obligations he guaranteed. He continued to be employed in high executive capacities by both of the affected corporations. Any profits earned from the transaction with respondents were reflected in the consideration received by him upon the subsequent sale of his interest in his corporations.

iii. Petitioner here has substantial business contacts in California.

In finding that the exercise of personal jurisdiction over him would be unreasonable, the Court in *Sibley* specifically noted that Sibley "does not own any real or personal property in this state, and does not have any business interests or relations with California except as trustee of a testamentary trust owning property in Cambria, California." 16 Cal.3d at 445.

In contrast, petitioner is an officer and director of at least one California corporation. (Appendix I) He

visits California in connection with the operations of his various corporations. (Appendix E) He has personally participated in meetings in California regarding the business of his several corporations. (A. 47) His corporations sold many warehouses to California residents other than the plaintiffs *(Id.)*, and he personally guaranteed the obligations of his corporations to many California residents (Appendix F). He is involved in other California litigation (Appendix J). These contacts with California are not merely isolated incidents but an integral part of the operations of petitioner's empire.

iv. Petitioner here participated in the negotiations of the lease and guaranty.

In *Sibley*, the guarantor took no part in the negotiation of the primary agreement. 16 Cal.3d at 445. In contrast, there was substantial evidence before the District Court and the Ninth Circuit that petitioner participated in the negotiation of the underlying leasehold obligations through his attorney. Mr. Richards specifically stated in his affidavit, "Attorney James R. B. Fitzsimmons purported to represent both defendant Daniel H. Overmyer and D. H. Overmyer Co., Inc. (Ohio), and its subsidiaries, in the aforementioned negotiations." (A. 47-48) Dr. Forsythe stated that it was his understanding that Fitzsimmons was "an attorney at law representing D. H. Overmyer Co., Inc. (Ohio), and D. H. Overmyer Co., Inc. (Oregon), and defendant Daniel H. Overmyer." (A. 44) Mr. Wilson stated, "These negotiations were carried on for the D. H. Overmyer Co.,

Inc. and defendant, Daniel H. Overmyer, individually by J. R. Fitzsimmons, assistant secretary of the corporation." (Appendix H) Even if Mr. Fitzsimmons had not represented petitioner personally, petitioner nevertheless participated in the negotiations through Mr. Fitzsimmons by telephone. (A. 44, 47-48. Appendix H) In contrast with *Sibley,* the preponderance of the evidence before the District Court and the Ninth Circuit was that petitioner actually took part in the negotiation of both the underlying obligation and his own guaranty.

The only arguable similarity between this case and *Sibley* is that both involved a suit on a guaranty. The dissimilarities are so numerous that they are overwhelming. Jurisdiction here was not asserted "solely by reason of" appellant's execution and breach of his guaranty. (Compare *Sibley,* supra, 16 Cal.3d at 444)

The facts simply do not support petitioner's argument. Although not disclosed in his petition, petitioner has numerous contacts with California other than the transaction with respondents. Since he personally guaranteed and controlled the performance of this and other corporate obligations in California and elsewhere, petitioner may not now argue that the Ninth Circuit's consideration of his substantial contacts with California is offensive to "traditional notions of fair play and substantial justice."

C. In truth, California courts would have exercised personal jurisdiction over petitioner.

California has provided that its courts "may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code Civ. Proc. §410.10. This makes California long-arm jurisdiction co-extensive with that allowed by the due process clause of the United States Constitution. *Threlkeld v. Tucker,* 496 F.2d 1101, 1103 (9th Cir. 1974), *cert. denied* 419 U.S. 1032 (1974). *Michigan Nat. Bank v. Superior Court, supra,* 23 Cal.App.3d at 6. As stated by the California Supreme Court in *Sibley:*

> Under Code of Civil Procedure Section 410.10, a California court may exercise jurisdiction over nonresidents on any basis not inconsistent with the United States or California Constitutions. This section manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations. [citations omitted] As a general constitutional principle, a court may exercise personal jurisdiction over a nonresident individual so long as he has such minimal contacts with the state that ". . . the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [citations omitted]

Sibley v. Superior Court, supra, 16 Cal.3d at 445.

Petitioner oversimplifies California decisions in regard to the exercise of personal jurisdiction over nonresident defendants. California does not espouse a mechanical doctrine that the mere mailing of a document to that State deprives the State of jurisdic-

tion. Rather, California has adopted the "minimum contacts" standard. In addition to the foregoing authorities, see such cases as *Abbott Power Corp. v. Overhead Electric Co.,* 60 Cal.App.3d 272, 280-83, 131 Cal. Rptr. 508 (1976); and *Quattrone v. Superior Court,* 44 Cal.App.3d 296, 302-306, 118 Cal.Rptr. 548 (1975).

By its jurisdictional rule, California has inherently espoused a rule of reason, in which the quality and nature of petitioner's activities in California and elsewhere, and petitioner's invocation of the benefits and protections of California law, must be analyzed in context. California's rule is one of fairness. The decision of the Ninth Circuit being reasonable in light of the facts, California courts would have reached the same conclusion. The comment in *Martin v. Detroit Lions, Inc.,* 32 Cal.App.3d 472, 108 Cal.Rptr. 23 (1973), is particularly in point:

> A California court may exercise jurisdiction over a nonresident defendant only within the perimeters of the due process clause as delineated by the decisions of the United States Supreme Court. *(International Shoe Co. v. State of Washington,* 326 U.S. 310, [90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057]; *Michigan Nat. Bank v. Superior Court,* 23 Cal.App.3d 1, 6 [99 Cal.Rptr. 823]; Code Civ. Proc., §410.10.) While it has been held that minimum contact for due process requires more than a "foot-fall on the State's soil" *(Erlanger Mills v. Cohoes Fibre Mills,* 239 F.2d 502, 509), where the cause of action arises out of economic activity within the state, the contacts need not consist of repeated or continuous business transactions; an isolated transaction, such as the breach of a contract made and to be performed in the state, may be sufficient. [citations omitted.]

CONCLUSION

The petition discloses no basis for the exercise of this Court's certiorari jurisdiction. No federal question involving the considerations delineated in Rule 19 is presented. What the petition presents is, at best, a disingenuous contention based upon an inadequate analysis of the facts which were before the District Court and the Ninth Circuit. The decision of the Court of Appeals is entirely consistent with constitutional principles and with the decisions of the courts of the State of California.

This petition is but a part of the delaying tactics by which petitioner is attempting to preclude the finality of the judgment which has been entered against him and appears to be but a part of a nationwide pattern of litigation practiced by the petitioner. In addition to his activities with respect to respondents, see *Overmyer v. Fidelity & Deposit Co. of Maryland,* 554 F.2d 539 (2nd Cir. 1977), where his appeal there was described as "a crass misuse of both the state and federal judicial systems to avoid the payment of a judgment."

For the above reasons, respondents respectfully request that the Petition for a Writ of Certiorari be denied forthwith.

Dated: August 25, 1978

Respectfully submitted,

JEROME SAPIRO, JR.,

TOBIN & TOBIN,

Attorneys for Respondents.

(Appendices Follow)

Appendices

Appendix A

(Excerpt from Plaintiffs' Exhibit 11 at Trial)

July 23, 1974

ROY BABITT, Bankruptcy Judge:

The parent debtor and forty of its subsidiaries each filed its own petition for an arrangement under the provisions of Chapter XI of the Bankruptcy Act, Sections 301 *et seq.*, 11 U.S.C. §§701 *et seq.*[1] Shortly after the filing of these petitions, a receiver was appointed by a Judge of the District Court to operate the business of the debtor and those subsidiaries set forth in the above caption.[2]

At the onset, it is necessary to broadly structure the main business of these companies, which, for purposes of facility, will be considered as the business of the parent debtor.[3] The debtor is engaged in the business of long term leasing of warehouse space from landlords under lease-back arrangements and short term subleasing of such space to subtenants at rentals in excess of that payable by the debtor to its landlord under the lease-back. This business began when the debtor purchased parcels of land and ar-

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[1]These were original petitions under Section 322, 11 U.S.C. §722, as no proceedings were pending when the jurisdiction of this court was invoked. Compare Section 321, 11 U.S.C. §721, which contemplates the filing of a petition for Chapter XI relief during the pendency of a bankruptcy.

[2]Two of the petitions have been dismissed; some are not affected by this decision which covers disputes arising in twenty of the cases as will be seen.

[3]The court uses the singular "debtor" to denote each of the debtors involved in these controversies since "the identity and individuality of the respective corporate entities are not relevant here . . ." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) at 179.

ranged for the financing necessary for it in order to construct a warehouse on the land. In the finished structure, the debtor would lease space to others or operate a public warehousing enterprise for itself.[4] When the newly constructed warehouses had thus become viable, the land and buildings were sold to an investor subject, of course, to the outstanding encumbrances. Under the terms of the sale, the debtor would take back a lease from the purchaser in a typical lease-back situation, and the debtor would continue to operate the warehouses, collecting from the subtenants the rents called for by the leases between the debtor and the subtenants while the debtor would pay to the landlord-purchaser the amounts reserved by the sale and lease-back instruments. In the lease-backs the typical lease was a net-net lease whereby the landlord-purchaser was to receive fixed rent from the debtor during the life of the lease, the term of which was usually in the vicinity of thirty years including two option periods, but with a reduced rent to be paid by the debtor during those option periods. Under the net-net leases the debtor, as tenant, was obliged to maintain the property and usually to pay all real estate and other taxes as well as mortgage payments. It is noted here that while the lease between the debtor and the landlord-purchaser covered, with the options, a rather extensive period of time, the debtor's subleases with subtenants occupying the warehouse facilities were for short terms, and the

[4]The public warehouse aspect of the debtor's business was terminated shortly after the Chapter XI petitions were filed.

total of the rents were in excess of the amount due the landlord-purchaser under the terms of the sale and lease-back to the debtor. This complex and widespread warehousing enterprise was described to the Supreme Court as "having built 'in three years . . . 180 warehouses in thirty states.'" *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) at 179. Thus the business of the debtor, once it had terminated its own public warehouse operation, was basically that of landlord to subtenants, its profit in this operation being generated by the difference between the aggregate of the rents due under the subleases in a given warehouse and the amount for which the debtor was liable to the landlord-purchaser. It was expected, as the option terms disclose, that during the option periods the debtor would generate larger income from its subleases during a period when its own payment to the landlord-purchaser was reduced. On their part the landlord-purchasers received a substantial fixed income on their investments and whatever benefits the intricate tapestry of the internal revenue law might bestow on purchaser-lessors. There is evidence in the record that by late 1973, the debtor's empire had been enhanced from the 180 warehouses noted by the Supreme Court to well over 200.

When the Chapter XI petitions were filed, virtually all of the debtors were in substantial arrears to these landlord-purchasers.[5] While the total amount of the

[5]The debtor also owned approximately twenty properties in fee. The payment due under many of the mortgages on such properties were in substantial arrears when these Chapter XI petitions came to this court.

arrearages has not been exactly ascertained, it is nowhere in dispute that the sum is well in excess of $12,000,000, and the landlord-purchasers represent the largest of the creditors, by far, with whom the debtor hopes to deal in these arrangement proceedings. At the time the petitions were filed the landlord-purchasers presented varying fact patterns in connection with what seems, from the record, to have been a continuing dialogue between them and their respective debtors concerning nonpayment of rent or otherwise denominated amounts reserved under the lease-backs, nonpayment of taxes, default of mortgage payments, lapse of insurance, non-repairs, etc. Some of the landlords had already been given possession in State Court proceedings. Some landlords had been given an assignment by the debtor of all rents due from the debtor's subtenants. For some properties, receivers had been appointed. Some landlords had begun proceedings in State Courts to regain their property but further proceedings to regain possession were stayed by this court.[6] Upon the filing of the petitions, this court entered orders staying the continuation or commencement of proceedings against the debtor affecting its property, it being clear that

[6]The caption of this action sets forth the name of the parent and all its subsidiaries in various states in which warehouses are operated by the particular corporate debtor under lease-back arrangements. The separate corporations appear to have contemplated the operation of the debtor in a particular state so that, for example, the Minnesota company would refer to warehouses in Minnesota. Not all of these debtors are involved in the instant litigation. However, for convenience, the court captions this decision in keeping with the separate petitions filed by each of the companies operating under lease-back arrangements.

the leases between the debtor and the purchaser-landlord and the subleases between the debtor and the warehouse operators were assets of these estates and therefore subject to the court's protection.

Within days of the filing of the petitions, virtually every landlord-purchaser began proceedings before this court either to recover its particular warehouse or to be permitted to proceed in other courts to recover such property. The litany was the same. The debtor was in substantial default in the payment called for by the net-net leases, that the properties were in need of repair for want of which the landlord's estates were being impaired, that mortgage foreclosures were threatened, that adverse tax action was being taken because of the debtor's default of the payment of taxes, that the landlords were obliged to make payments just to preserve the property, and that not only did the defaults by the debtor in making the payments constitute such default as to justify a conclusion that the leases had thereby terminated but the filing of the Chapter XI petitions by these debtors also constituted the happening of such event as to support the conclusion that the leases had terminated for that reason.

Appendix B

(District Court Docket)

PROCEEDINGS

C-73-1900 WHO

Date	
1974	
Sep. 17—15.	Filed Pltfs. 1st Interrogs to Deft.
Oct. 8—16.	Filed Clerk's Not of Pre Disc Conf., 12/16/74, 9 am
Oct. 24—17.	Filed STIP ex time to 11-15-74 to deft to ans interrogs.
Nov. 15—18.	Filed Stip & ORD ext deft's time to resp to interrogs to 11-25-74 -LH
Nov 21—19.	Filed Defts. Afft of Mailing next above.
Nov. 25—20.	Filed Defts. Ans to Pltfs 1st Interrogs.
Nov. 26—21.	Filed affidavit of mailing by deft.
Dec. 16	ORD: Pre Disc Conf., cont to 5/7/75, 9am for PT Conf, 5/19/75 10am for Trial-WHO
Dec. 16—22.	Filed Clerk's Not of PT Conf., 5/7/55, 9am
1975	
Mar. 4—23.	Filed Pltfs Sub of Attys
Apr. 22—24.	Filed pltfs' P/T Stmt
25.	Filed pltfs' Trial Brief LODGED Findings of Fact & Conclusions of Law
26.	Filed Crt. of mailing of pltfs' P/T Stmt, Trial Brief, Findings of Fact, etc.
27.	Filed deft's P/T Stmt

Apr. 28—28. Filed deft's Findings of Fact & conclusions of Law
29. Filed deft's Trial Brief
30. Filed pltf's proposed exhbts
31. Filed pltfs' Object to deft's exhbt "A" (File Folder #3)
Apr. 29—32. Filed pltfs' Cert. of Mailing of item #31
May 2—33. Filed pltfs' Reply to deft's Trial Brief
34. Filed Stip & ORD re: compliance w/ not. of P/T conf –WHO
May 6 ORD: P/T conf cont to 5-9-75/10am –WHO
9—35. Filed deft's Reply to pltf's Trial Brief ORD: P/T conf; cont to 5-27-75/4:30 pm for Trial by Ct; Trial to consist of stipulated facts, stip to be filed by 5-19-75, (Trial date of 5-19-75 vacated) –WHO
May 12—36. Filed Joint Req for Ct Setl Conf under L.R. 110
May 19—37. Filed Stip of Agreed Stmt of Facts
38. Filed Afdvt of Max W. Forsythe
May 28—39. Filed afdvt of Jerome Sapiro, Jr.
May 27 ORD: CT TRIAL Stipulated Facts; pltfs' mo to amend complt GRANTED, amend to be filed; deft's mo to reconsider Ord of Judge Burke—DENIED counsel to submit cert memos & briefs by 6-2-75, responses due 6-4-75; fur Trial on 6-5-75/2pm –WHO
40. Filed pltfs' *AMEND TO COMPLT*

June 2—41. Filed deft's Suppl Trial Brief
June 9—42. Filed pltfs' closing trial Brief
June 13 Fur. Court trial: Findings of Fact read into the record Case submitted within 10 days. WHO
June 24—43. Filed letter from Counsel req ext of time
July 1—44. Filed Cert of Counsel re Services Rendered by Attys for Pltf; exhibit attached
July 7—45. Filed pltf's Suppl Cert of Counsel re Services Rendered by Attys for pltf (orig & 2 copies)
July 17—46. Filed *Findings of Fact and Conc of Law* WHO
July 21—47. Entered JUDGT: pltfs to recover $90,618.17 with interest and $11,796.38 in costs of action and atty's fees (filed 7-17-75) WHO
July 21—Copies mailed to parties of record
July 23—48. Filed deft's Not. of Disapproval and Objection to Findings

Appendix C
(Excerpt from Lease)

ARTICLE XXVI

JURISDICTION

Section 26.01. It is specifically understood and agreed that this lease agreement is entered into in the State of California and the parties hereto agree that the same shall in every respect be subject to the jurisdiction of the courts of the State of California, and shall be interpreted in accordance with the law of the State of California. In the event that any portion of this lease agreement should, despite the provisions of this paragraph, be held to be subject to the jurisdiction or the law of any other State, the remaining provisions of this agreement shall be unaffected by such determination and shall be interpreted in accordance with the laws of the State of California and shall be subject to the jurisdiction of the courts of that State.

Appendix D

(Clerk's Transcript p. 100 before Ninth Circuit)

ARRANGEMENT

United States District Court,
Southern District of New York.

In the Matter of:

	Tax I.D. Nos.	Debtor Nos.
D. H. Overmyer Co. Inc. (Alabama)	13-2546496	No. 73 B 1126
D. H. Overmyer Co. Inc. (Arizona)	86-0194429	No. 73 B 1127
D. H. Overmyer Co. Inc. of Ohio	34-4472939	No. 73 B 1128
D. H. Overmyer Co. Inc. (Ohio)	34-4445361	No. 73 B 1129
D. H. Overmyer Co. Inc. (California)	13-2550218	No. 73 B 1130
D. H. Overmyer Co. Inc. (Colorado)	84-0532888	No. 73 B 1131
D. H. Overmyer Co. Inc. (Connecticut)	13-2554450	No. 73 B 1132
D. H. Overmyer Co. Inc. (Delaware)	13-2546497	No. 73 B 1133
D. H. Overmyer Co. Inc. (Florida)	59-1088267	No. 73 B 1134
D. H. Overmyer Co. Inc. (Georgia)	58-0948051	No. 73 B 1135
D. H. Overmyer Co. Inc. (Illinois)	13-2546587	No. 73 B 1136
D. H. Overmyer Co. Inc. (Indiana)	13-2546498	No. 73 B 1137
D. H. Overmyer Co. Inc. (Kansas)	13-2584215	No. 73 B 1138

D. H. Overmyer Co. Inc. (Kentucky)
13-2546499 No. 73 B 1139
D. H. Overmyer Co. Inc. (Louisiana)
72-0594172 No. 73 B 1140
D. H. Overmyer Co. Inc. (Maryland)
13-6180154 No. 73 B 1141
D. H. Overmyer Co. Inc. (Michigan)
13-2546500 No. 73 B 1142
D. H. Overmyer Co. Inc. (Massachusetts)
13-6177004 No. 73 B 1143
D. H. Overmyer Co. Inc. (Minnesota)
41-0885247 No. 73 B 1144
D. H. Overmyer Co. Inc. (Mississippi)
13-2546501 No. 73 B 1145
D. H. Overmyer Co. Inc. (Missouri)
43-0827644 No. 73 B 1146
D. H. Overmyer Co. Inc. (Nebraska)
13-2546502 No. 73 B 1147
D. H. Overmyer Co. Inc. (Nevada)
13-2546503 No. 73 B 1148
D. H. Overmyer Co. Inc. (New Jersey)
13-2546504 No. 73 B 1149
D. H. Overmyer Co. Inc. (New Mexico)
13-2541696 No. 73 B 1150
D. H. Overmyer Co. Inc. (New York)
13-2530444 No. 73 B 1151
D. H. Overmyer Co. Inc. (North Carolina)
56-0843385 No. 73 B 1152
D. H. Overmyer Co. Inc. (Oklahoma)
73-0750609 No. 73 B 1153
D. H. Overmyer Co. Inc. (Oregon)
13-2550220 No. 73 B 1154
D. H. Overmyer Co. Inc. (Pennsylvania)
13-6175691 No. 73 B 1155
D. H. Overmyer Co. Inc. (Rhode Island)
13-2584216 No. 73 B 1156

D. H. Overmyer Co. Inc. (Tennessee)
13-2546506 No. 73 B 1157
D. H. Overmyer Co. Inc. (Texas)
11-2064895 No. 73 B 1158
D. H. Overmyer Co. Inc. (Utah)
13-2541695 No. 73 B 1159
D. H. Overmyer Co. Inc. (Virginia)
54-0760271 No. 73 B 1160
D. H. Overmyer Co. Inc. (Washington)
13-2550221 No. 73 B 1161
D. H. Overmyer Co. Inc. (Wisconsin)
13-2546507 No. 73 B 1162
of 201 East 42nd Street, New York, N. Y. Debtor Nos. (as above).

NOTICE IS HEREBY GIVEN that on November 16th, 1973 the above named debtors filed a petition under Chapter XI of the Bankruptcy Act and States that they intend to propose an arrangement with their unsecured creditors. A first meeting of creditors will be held before the undersigned Bankruptcy Judge, in the courtroom, Room 201, United States Court House, Foley Square, New York, N. Y. 10007, on January 29th, 1974, at 1:00 P.M., at which place and time the creditors may attend, prove their claims, nominate a trustee, appoint a committee of creditors, examine the debtor and transact such other business as may properly come before said meeting, including hearing and determining whether the debtor should be adjudged a bankrupt, and bankruptcy proceeded with, or the proceedings dismissed on any of the grounds specified in Section 376 of the Act.

NOTICE IS ALSO GIVEN that the 28th day of February, 1974 is hereby fixed as the last day for the filing of applications, as provided in Section 17C(2) of the Bankruptcy Act, to determine the dischargeability of debts claimed to be nondischargeable pursuant to Clauses (2), (4) or (8) of Section 17A of the Bankruptcy Act.

Accompanying this notice is a summary of the assets and liabilities Scheduled by said debtor.

DATED: New York, New York
January 9, 1974

ROY BABITT
Bankruptcy Judge

Notice

You must file a claim before confirmation in order to participate in the distribution of the consideration, if any, to be deposited.

Appendix E

(Answer to Plaintiffs' First Interrogatories)

INTERROGATORY NO. 7

Have you made visits to California during which you transacted business from January 1, 1967 to the present? If so, state for each visit:

(a) The purpose of such visit;

(b) The dates of arrival and departure;

(c) Your address(es) while in California;

(d) With whom you met;

(e) The dates of such meetings; and

(f) The purposes of such meetings.

RESPONSE TO INTERROGATORY NO. 7

(a) The purpose of all visits was to meet with general managers and vice presidents of D. H. Overmyer Co., Inc. (California) and review progress in their operations.

(b) From January 1, 1967, to November, 1973, I visited California an average of two times per year in my capacity as Chairman of the Board and chief executive officer of D. H. Overmyer Co., Inc. (California).

OBJECTION is made to Interrogatory No. 7 insofar as it calls for specific dates of arrival and departure, in that it is unduly burdensome and such information is not readily available to Defendant; the information is irrelevant to the subject matter

of this action as it is not contended that the Defendant personally engaged in any of the activities which form the subject matter of this action; the question is too broad and it is not calculated to lead to discovery of admissible evidence.

(c) As a rule, I stayed in various hotels while in California.

OBJECTION is made to Interrogatory No. 7, upon the same grounds as set forth immediately above, insofar as it requests specific addresses.

Appendix F

(Answer to Plaintiffs' First Interrogatories)

INTERROGATORY NO. 10

From January 1, 1967 to the present, have you, D. H. Overmyer, Inc. (Ohio) or any of its subsidiaries guaranteed the obligations of any corporate entity to any California resident? If so, state for each such obligation guaranteed:

(a) The name and address of each obligee;

(b) The name and address of each obligor;

(c) The obligation guaranteed; and

(d) The consideration given for the guaranty.

RESPONSE TO INTERROGATORY NO. 10

D. H. Overmyer Co., Inc. (Ohio) and I have guaranteed obligations to not less than ten California residents. The records necessary to formulate an accurate answer to this interrogatory are not available because of several moves and because the corporate entities have filed proceedings under Chapter XI of the Bankruptcy Act.

OBJECTION is made to Interrogatory No. 10 insofar as it calls for specific information about such guaranties on the grounds that it is unduly burdensome, too broad, irrelevant, and not calculated to lead to discovery of admissible evidence, because the records are under the control of a receiver pursuant to authority of the Bankruptcy Court and because guar-

anties, other than the one in this case which is admitted, are not pertinent to the question of amounts due, if any, under the lease and guarantee in this case.

Appendix G

(Excerpt from Lease)

This Lease, entered into this 18th day of October 1968 between

Max W. Forsythe

(hereinafter referred to as the LANDLORD) who currently resides at Atherton, California to D. H. OVERMYER CO., INC. (hereinafter referred to as the TENANT), an Oregon corporation with administrative offices at 201 East 42nd Street, Manhattan, New York, New York 10017.

The Landlord owns title to certain land, (hereinafter referred to as the Demised Premises), the accurate description of which Demised Premises is fully set forth in Schedule A, which Schedule is annexed to and hereby made a part of this lease. The Landlord is willing to make and the Tenant is willing to take a leasehold in these premises. Negotiations between representatives of the Landlord and those representing the tenant have culminated in the formulation of a Leasehold, the precise terms, conditions and provisions of which follow.

Section 1.01. Landlord hereby leases to Tenant and Tenant hereby hires from Landlord the real property, the buildings, other improvements thereon, and appurtenances identified above as the Demised Premises, together with all rents, issues and profits, easements, tenements, appurtenances, hereditenants

[sic] fixtures, rights and privileges thereto belonging, or in any way appertaining. The Demised Premises are leased subject to the existing state of the title, to encumbrances, covenants, easements, reservations of rights of way, if any, any encroachment over any street or adjoining property, any state of facts which an accurate survey or physical inspection might show, zoning regulations, restrictions, resolutions and ordinances, building restrictions and all governmental regulations now in effect or hereafter adopted by any governmental authority having jurisdiction.

Section 1.02. The Tenant, its successors and assigns, shall have and hold the Demised Premises upon and subject to the terms, covenants, agreements and conditions herein contained, for the term herein specified or until sooner terminated by law or as herein provided.

ARTICLE II

Term

Section 2.01. This Lease shall be for a term of twenty years, commencing on October 18, 1968.

ARTICLE III

Rent

Section 3.01. Tenant shall pay to Landlord, at either his principal office or such other place as Landlord shall specify in writing, rent, in such coin or currency of the United States of America as at the time of payment shall be legal tender for all debts, public

and private, in the amount of $7,295.83 per month payable in advance on the 20th day of each and every month throughout the term of this lease, ... [text lined out] .....

Appendix H

(Declaration of John P. Wilson)

DECLARATION

The undersigned hereby states as follows:

During the month of October, 1968, I represented M.W. Forsythe, Helen Forsythe, Bush Hayden and Jean Mulliken in connection with the purchase from and lease back to D.M. Overmyer Co., Inc., an Oregon corporation, certain real property, more particularly described in a lease dated October 18, 1968, between Max W. Forsythe and D.H. Overmyer Co., Inc.

The negotiations for the purchase of said land and the lease back to the Overmyer company occurred in my offices in Menlo Park, California over a period of six to ten days, ending October 18, 1968. These negotiations were carried on for the D.H. Overmyer Co., Inc., and defendant, D.H. Overmyer, individually, by J.R. Fitzsimmons, assistant secretary of the corporation. It was my understanding from Mr. Fitzsimmons that he did not have unlimited authority from either the corporation or defendant, D. H. Overmyer, and as a consequence, the negotiations were interrupted one or more times while Mr. Fitzsimmons communicated with the Overmyer company, or defendant, D.H. Overmyer. During the course of the negotiations, I did, on behalf of the lessees, request of Mr. Fitzsimmons that he obtain the personal guaranty of defendant, D.H. Overmyer of the per-

formance of all of the terms and conditions of the lease. As a result of this, I received a telegram dated October 18, 1968, and this telegram was followed by a written personal guaranty of said defendant, D.H. Overmyer, dated October 21, 1968.

It was my understanding that Mr. Fitzsimmons was representing defendant, D.H. Overmyer, individually, and these negotiations and this understanding was reinforced particularly by the telegraphic and written response of said defendant to my request of Mr. Fitzsimmons that defendant, Overmyer, supply his personal guaranty.

I, John P. Wilson, declare under penalty of perjury that the foregoing is true and correct.

Executed on March 8, 1974, at Menlo Park, California.

/s/ John P. Wilson
John P. Wilson

Appendix I

(Answer to Plaintiffs' First Interrogatories)

INTERROGATORY TO NO. 8

Are you an officer, director or employee of any corporation which is now doing or has done business in California? If so, state for each such corporation:

(a) Your position or title;

(b) The inclusive dates of your association; and

(c) Your responsibilities.

RESPONSE TO INTERROGATORY NO. 8

(a) Chairman of the Board, President, and Treasurer of D. H. Overmyer Co., Inc., a California corporation.

(b) Since November 1973.

(c) Responsibilities are as indicated by position held.

OBJECTION is made to this interrogatory insofar as it requests a listing of specific responsibilities on the grounds that it is unduly burdensome and too broad; and all inclusive lists of responsibilities cannot be obtained; the information is irrelevant and not calculated to lead to discovery of admissible evidence, for the reasons set forth in the objection to Interrogatory No. 3, which are incorporated herein by reference.

Appendix J

(Answer to Plaintiffs' First Interrogatories)

INTERROGATORY NO. 11

From January 1, 1971 to the present, have you, D. H. Overmyer, Inc. (Ohio) or any of its subsidiaries been involved in litigation or arbitration in California? If so, state for each such litigation or arbitration:

(a) The plaintiffs;

(b) The defendants;

(c) The title of the court and cause; and

(d) The names and addresses of attorneys for plaintiffs and of attorneys for defendants.

RESPONSE TO INTERROGATORY NO. 11 . .

Yes. D. H. Overmyer Co., Inc. (Ohio), D. H. Overmyer Co., Inc. (California), and I have each been involved in litigation in California.

OBJECTION is made to Interrogatory No. 11 insofar as it requests more specific information than is given above on the grounds that it is irrelevant, the question is too broad, and the information requested is not calculated to lead to discovery of admissible evidence, for the reasons set forth in the objection to Interrogatory No. 10, which are incorporated herein.